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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAVAL DAVIS,

Defendant and Appellant.

F057860 & F057861

(Super. Ct. Nos. BF126574A & BF117369A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice and Jerold L. Turner, Judges[†].

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

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[*] Before Cornell, Acting P.J., Dawson, J. and Hill, J.

[†] Judge Turner ruled on the motion to suppress; Judge Felice imposed sentence.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant appeals the judgment of conviction in one case and the finding that he violated his probation in a second case, following the denial of his motion to suppress evidence pursuant to Penal Code section 1538.5. We conclude the challenged evidence was obtained as a result of an unlawful detention of defendant, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 2007, defendant pled guilty to one felony count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) in case No. BF117369A. He was placed on three years' probation, which included a condition that he submit to search for narcotics without a warrant or probable cause. On February 4, 2009, the complaint in case No. BF126574A was filed, charging defendant with one felony count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and one misdemeanor count of possession of drug paraphernalia (Health & Saf. Code, § 11364). On that date, he was arraigned on the new charges and on a violation of probation in the earlier case. On March 24, 2009, in each proceeding, defendant filed a motion pursuant to Penal Code section 1538.5 to suppress evidence seized as a result of a search conducted during the events that gave rise to the newer charges. The People filed oppositions; the court took evidence and denied the motions. On April 15, 2009, the court found defendant violated his probation in case No. BF117369A and revoked his probation. It sentenced him to the upper term of three years. Subsequently, in case No. BF126574A, defendant agreed to plead guilty to count 1 in exchange for dismissal of count 2 and a maximum term of two years in prison, to run concurrently with the sentence on the probation violation. The

court imposed the agreed upon two-year concurrent sentence. Defendant challenges the denial of his motion to suppress in each case. The appeals have been consolidated.

On February 2, 2009, at 3:25 a.m., Officer Jason Felgenhauer of the Bakersfield Police Department was on patrol in a marked police vehicle in an area of high narcotic activity when he saw a parked Ford Taurus with two occupants. He stopped his vehicle behind the Taurus and put his white spotlight on it. He walked up to the driver's side and spoke to defendant, the driver, through the open window. He stood just outside the driver's door with his flashlight shining on defendant's hands for safety. He asked defendant if he could speak with him; defendant said, "[y]es, sir." The officer asked both occupants for their identification, which both men provided. Officer Felgenhauer returned to his patrol car and conducted a records check, which indicated defendant was on probation with a search term for narcotics. Officer Felgenhauer approached the Taurus again, and asked defendant if he would mind stepping out of the car for a search; defendant responded "[s]ure," then added, "I'll work with you, man." Officer Felgenhauer patted defendant down for weapons and narcotics, then asked if he had anything illegal in the vehicle; defendant stated he had a pipe. The officer asked defendant to remove the beanie from his head; in the beanie, Officer Felgenhauer located three rocks he suspected were cocaine. He placed defendant in custody. A subsequent search of the car revealed a glass smoking pipe in the place defendant had said it would be.

DISCUSSION

I. Standard of Review

The Fourth Amendment of the United States Constitution protects against "'unreasonable searches and seizures.'" (*People v. Williams* (1999) 20 Cal.4th 119, 125.) It requires state and federal courts to exclude evidence that government officials obtained in violation of the amendment's protections. (*Ibid.*) Warrantless searches are per se unreasonable under the Fourth Amendment, """subject only to a few specifically

established and well delineated exceptions."'" (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 372.) Under Penal Code section 1538.5, a defendant may move to suppress evidence obtained in an unreasonable seizure. (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1105 (*Garry*).) In reviewing the trial court's ruling on a motion to suppress, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 363.)

II. Detention or Consensual Encounter

"The United States Supreme Court has identified three categories of police contact with persons. The first is referred to as a 'consensual encounter' in which there is no restraint on the person's liberty. There need be no objective justification for such an encounter. The second type, called 'detention,' involves a seizure of the individual for a limited duration and for limited purposes. A constitutionally acceptable detention can occur 'if there is an articulable suspicion that a person has committed or is about to commit a crime.' The third type involves seizures in the nature of an arrest, which may occur only if the police have probable cause to arrest the person for a crime." (*People v. Bailey* (1985) 176 Cal.App.3d 402, 405.)

"A detention is a seizure of the person. It is generally agreed that '"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [Citation.]' [Citations.]" (*People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.) "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." (*United States v. Mendenhall* (1980) 446 U.S. 544, 553.) The test is an objective one; it is irrelevant what the officer intended or what the particular contacted person perceived. (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227 (*Castaneda*).)

Unlike detentions, consensual encounters do not trigger Fourth Amendment scrutiny. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) They require no articulable suspicion that the person encountered has committed or is about to commit a crime. (*Ibid.*) "An officer has every right to talk to anyone he encounters while regularly performing his duties, such as investigating illegal parking [citation] or cars parked in lots late at night [citation]. Until the officer asserts some restraint on the contact's freedom to move, no detention occurs." (*Castaneda, supra*, 35 Cal.App.4th at p. 1227.) """[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."" (*People v. Gonzales* (1985) 164 Cal.App.3d 1194, 1196.)

The question raised by defendant's motion to suppress was whether the contact between Officer Felgenhauer and defendant prior to the search constituted a detention, which could be justified only if the officer had an articulable and reasonable suspicion that defendant had committed or was about to commit a crime, or a consensual encounter, which required no such justification.

Officer Felgenhauer did not make a traffic stop of defendant's vehicle; the vehicle was already parked, with defendant and another person inside. The officer stopped his patrol car behind the car defendant was sitting in, approached the car, and spoke to defendant through the open window. There was no evidence the officer blocked defendant's vehicle or prevented it from moving. These actions placed no restraints on defendant and constituted a consensual encounter.

Shining his spotlight on defendant's car, by itself, did not create a detention. In *Garry*, the court reviewed cases in which police officers shone a spotlight on subjects while approaching to speak with them at night. It opined that, in determining whether a reasonable person would have believed he was not free to leave, the court must consider

all of the circumstances, including the officers' verbal and nonverbal actions, the words used and their verbal tones, whether they made requests or commands, how the officers physically approached their subjects, including whether they blocked the subject's way and prevented him from leaving, and whether they displayed weapons. (*Garry*, *supra*, 156 Cal.App.4th at pp. 1110-1111.) The court concluded that, "while cases have not found the use of a spotlight alone to constitute a detention [citations], they also indicate its use should be considered in determining whether there was a show of authority sufficient to establish one occurred." (*Id.* at p. 1111.)

In *People v. Perez* (1989) 211 Cal.App.3d 1492, the court concluded that shining the patrol car's high beams and spotlight on defendant's car "did not manifest police authority to the degree leading a reasonable person to conclude he was not free to leave" and therefore did not result in a detention. (*Id.* at p. 1496.) "While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." (*Ibid*.)

Likewise, the request for identification, by itself, did not convert the encounter into a detention. An officer is free to ask a person for identification without implicating the Fourth Amendment. (*People v. Vibanco* (2007) 151 Cal.App.4th 1, 14.) "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." (*Immigration & Naturalization Service v. Delgado* (1984) 466 U.S. 210, 216.) Officer Felgenhauer, however, did not merely ask defendant his identity or ask for and examine his license or identification. The officer testified that, after asking the driver and the passenger in the vehicle for identification and receiving it, he "returned to [his] vehicle and conducted a records check," which revealed that defendant was on probation with a condition permitting him to be searched for narcotics.

Defendant contends that, if he was not detained at an earlier point, he was detained when Officer Felgenhauer retained defendant's driver's license to run a records check. In

Castaneda, a police officer contacted Castaneda while he was seated in the passenger seat of an illegally parked car. (*Castaneda, supra,* 35 Cal.App.4th at p. 1225.) The officer asked for and received Castaneda's identification, and questioned him about the ownership of the car. While one officer wrote a parking citation for the car, the other officer checked Castaneda's records by radio, discovering an outstanding arrest warrant. The officers arrested and searched defendant, finding marijuana and cocaine in his pockets. (*Id*. at p. 1226.) The court opined that Castaneda was not detained when the officer approached and spoke with him, or when he requested Castaneda's identification. However, "once Castaneda complied with his request and submitted his identification card to the officers, a reasonable person would not have felt free to leave. And once the officers began writing the parking ticket, *no one* would have tried to walk away from them." (*Id*. at p. 1227.)

Federal cases have concluded retention of a person's identification or other documents while the officer conducts a warrant check may result in a detention. In *United States v. Guerrero* (10th Cir. 2007) 472 F.3d 784 (*Guerrero*), a police officer on his lunch break observed the defendants parked at a gas station across the street. He approached and questioned them about their travel plans. He asked for their identification and car registration, which he took with him to his patrol car and ran a check. The officer then returned the defendants' paperwork and asked more questions, including asking for consent to search the car. The court concluded:

> "To be sure, if officers merely examine an individual's driver's license, a detention has not taken place. [Citation.] But once the officers take possession of that license, the encounter morphs into a detention: 'Precedent clearly establishes that when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter.' [Citation.] During the time that Deputy Rhodd held their paperwork, Defendants were detained." (*Guerrero, supra,* 472 F.3d at pp. 786-787.)

In *United States v. Analla* (4th Cir. 1992) 975 F.2d 119, police received a report that a person fitting the description of a robbery-murder suspect was in a telephone booth outside a convenience store. Officers responded and approached Analla; they asked for and were given his driver's license and registration. Standing next to Analla, an officer used his walkie-talkie to check the license with the dispatcher. The officer testified that, if Analla had asked for his license back, the officer would have had no choice but to return it. The officers subsequently obtained Analla's consent to search his car, in which they discovered evidence of the murder. Analla challenged the legality of the search. The court determined Analla was not detained when the officers asked for his license and registration. (*Id*. at p. 124.) Neither officer had his gun drawn, or used or threatened to use physical force; their tone of voice was not intimidating. The officer "necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher. However, he did not take the license into his squad car, but instead stood beside the car, near where Analla was standing, and used his walkie-talkie. Analla was free at this point to request that his license and registration be returned and to leave the scene." (*Ibid*.)

In *People v. Bouser* (1994) 26 Cal.App.4th 1280 (*Bouser*)**,** a police officer saw the defendant one afternoon, apparently looking for something in an alley known for drug dealing. When he saw the officer, the defendant began to walk away. The officer parked his patrol car four feet behind the defendant, then approached on foot, greeting the defendant and asking, "You mind if we talk?" (*Id.* at p. 1282.) The officer asked the defendant his name, some other general questions, and what he was doing in the alley. He filled out a field interview card and ran a records check from outside his car to determine if the defendant had any outstanding warrants. The defendant had an outstanding traffic warrant; the officer arrested him and found tar heroin in his pants pocket. (*Id.* at pp.1282-1283.)

The defendant contended he was unlawfully detained when the officer ran the records check. (*Bouser, supra*, 26 Cal.App.4th at p. 1283.) The court reviewed federal and out-of-state cases which generally held that "commencing a warrant check does not constitute a seizure per se but *detaining* a person without cause until a warrant check is completed is illegal." (Id. at pp. 1286.) The court refused to adopt a bright-line rule that running a warrant check automatically transforms an otherwise consensual police contact into a seizure. (*Id*. at p. 1287.) It considered the "warrant check a single circumstance that must be viewed in light of the other facts presented." (*Ibid*.) Considering the totality of the circumstances, the court concluded Bouser was not detained. There, however, the defendant did not turn over anything, such as a driver's license, to the officer while the warrant check was completed. (*Ibid*.)

From these authorities we conclude that, while a request for a person's identification during a consensual encounter does not necessarily convert that encounter into a detention, in some circumstances a detention may occur when the officer retains the identification in order to conduct a records check. If the officer immediately radios information to the dispatcher while examining the identification, without taking the identification away from the person or extending the encounter, a detention may not result. However, if the officer takes the identification and returns to his vehicle with it, while the person remains at a distance waiting for the officer to return his identification, a reasonable person would not feel free to leave, to approach the officer and ask for his identification to be returned, or to otherwise terminate the encounter. A person approached in a consensual encounter "'may not be detained even momentarily without reasonable, objective grounds for doing so.'" (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 789.) We conclude defendant was detained unlawfully when, without any articulable reason to detain him, Officer Felgenhauer turned his spotlight on defendant's car, requested his identification, then retained defendant's identification while he returned to his patrol car and ran a records check.

As the People point out, Officer Felgenhauer did not specifically testify that he retained defendant's identification while he returned to his patrol car to run the records check. He simply testified that defendant and his passenger provided identification, and Officer Felgenhauer returned to his vehicle and conducted a records check. The People argue: "This left open the possibility that the officer examined appellant's identification, noted appellant's identifying information, returned the identification to appellant, and then ran the records check." The burden was on the People to establish justification for the warrantless search or seizure. (*People v. Johnson* (2006) 38 Cal.4th 717, 723.) If those were the facts, it was the People's burden to establish them in order to justify the subsequent search. Substantial evidence does not support a finding that the officer returned the identification to defendant and his passenger before he went to his patrol car to conduct the records check.

Whether evidence discovered as a result of an illegal detention must be suppressed depends on "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) The search of defendant's car was conducted pursuant to a probation search condition of which Officer Felgenhauer became aware as a result of his records check of defendant's identification. A search conducted pursuant to a valid consent does not violate the Fourth Amendment if the search does not exceed the scope of the consent. (*People v. Bravo* (1987) 43 Cal.3d 600, 605.) A probationer who consents to a probation term permitting a search of his person or property at any time without a warrant, "consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term." (*Id*. at p. 608.) A search may be justified pursuant to a probation search condition only if the officers conducting the search have knowledge of the probation search condition at the time they conduct the search. (*People v. Robles* (2000) 23 Cal.4th 789, 797, 800; *Myers*

v. Superior Court (2004) 124 Cal.App.4th 1247, 1252.)

Officer Felgenhauer learned of defendant's search condition as a direct result of the records check he ran while defendant was unlawfully detained. He immediately returned to defendant's car and conducted a search of defendant and his car. The search that revealed the contraband followed closely after the illegal detention, and there were no intervening circumstances attenuating the taint. The People do not contend the detention and search were sufficiently attenuated that the taint of the illegality was purged. We conclude the fruits of the search should have been suppressed as the products of the illegal detention, and the trial court erred in denying defendant's motion to suppress.

DISPOSITION

The judgment in case No. BF126574A and the order finding defendant violated his probation in case No. BF117369A are reversed. The case is remanded to the trial court with directions to permit defendant to withdraw his guilty plea in case No. BF126574A, to vacate its order denying the motions to suppress, to enter a new order granting the motions to suppress, and to undertake any other necessary proceedings in accordance with applicable law.